No 20451

In The

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWIN JONES MONTGOMERY, SR., et al.,	)
Petitioner,	)
vs.	)
COMMISSIONER OF INTERNAL REVENUE,	)
Respondent.	)

PETITIONER'S OPENING BRIEF

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STATEMENT OF JURISDICTION

The Tax Court of the United States, having jurisdiction under 26 U.S.C. §§ 6213, 6214 and 7442, heard this case upon an Amended Petition filed by petitioner[1] on August 18, 1964 (I-A Tr. 33).[2] On April 15, 1965, the Tax Court dismissed the petition (I-A Tr. 71), and on May 12, 1965, it denied petitioner's motion to set the order of dismissal aside (I-A Tr. 72). The

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[1] Throughout this Brief, the singular noun "petitioner" will be used to refer to Edwin Jones Montgomery, Sr. Mr. Montgomery's wife, Dorothy Scott Montgomery, is named as a party herein and was so named in proceedings in the Tax Court because she and her husband filed joint tax returns throughout the years in question.

case is before this Court on a petition for review timely filed in the Tax Court on July 12, 1965 (I-A Tr. 84), 26 U.S.C. §7483, and a stipulation as to venue filed August 12, 1965 (I-A Tr. 98). This Court has jurisdiction pursuant to 26 U.S.C. §7482.

STATEMENT OF THE CASE

This appeal is concerned with the propriety of the Tax Court's rulings on petitioner's request for additional time within which to prepare his case.

Petitioner graduated from college in 1936 (II-B Tr. 36). By 1946 he had, largely through an investment advisory business, built a fortune of more than $250,000.00 (II-B Tr. 38). In that year, he formed a corporation to operate a helicopter service in Arizona (II-B Tr. 38-39). This venture was not successful, and by 1950 petitioner had lost his own fortune together with some $50,000.00 to $75,000.00 invested by friends (II-B Tr. 44). From that time until the time of trial, petitioner "habitually worked nights and weekends" (I-A Tr. 79) in an effort to regain

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[2]References to volume I-A of the transcript will be designated "I-A Tr. ____." References to volume II-B of the transcript will be designated "II-B Tr. _____." In volume II-B, the pages which relate to proceedings in Washington on May 27, 1964, are separately numbered from those relating to proceedings in San Francisco in April of 1965. Page numbers of volume II-B will, throughout this Brief, refer to the transcript of the proceedings in San Francisco unless the context indicates otherwise. The transcript of proceedings in San Francisco begins on what is actually the seventh page of volume II-B.

his vanished affluence. He spent most of his time outside regular working hours unsuccessfully pursuing large commissions (II-B Tr. 71, 72), attempting, for example, to resuscitate a dormant helicopter company (II-B Tr. 66-68) in the hope of earning a $50,000 commission.

Throughout 1957, 1958, and part of 1959, petitioner's home was in Newtown, Pennsylvania (II-B Tr. 46). On March 24, 1959, a fire destroyed all of the business records which petitioner possessed at that time (I-A Tr. 79, 82, 83). In the same year, petitioner moved to California. Throughout this time he continued to work nights and weekends (I-A Tr. 79).

At some time during this period, the Internal Revenue Service audited petitioner's tax returns for the years 1952 through 1956, and cases involving these returns were docketed in the Tax Court. These cases were twice continued and then settled (II-B Tr. 7).

In April of 1961, the Internal Revenue Service first contacted petitioner concerning an audit of the years 1957 through 1959 (II-B Tr. 109). Later, the Internal Revenue Service added the year 1960 to the years already under audit (I-A Tr. 7). Some of the deductions claimed in the return were allowed by the Internal Revenue Service during the course of subsequent negotiations (II-B Tr. 117), but on December 12, 1963, the Internal Revenue Service issued a statutory notice of deficiency disallowing other deductions, including all of

petitioner's claimed business losses, and losses on Arizona rental property (I-A Tr. 7).

From then until the summer of 1964, such time as petitioner felt he could spare for his tax case was devoted to the preparation of various papers for filing in the Tax Court. He filed a six page Petition on March 6, 1964 (I-A Tr. 1). The Government moved to dismiss (I-A Tr. 20), and on May 25, petitioner filed a five page amendment to his petition (I-A Tr. 23) and a three page answer to respondent's motion (I-A Tr. 28). The Court on May 27 found that petitioner's amendment did not cure the defects in his petition and ordered him to file a "proper amended petition" by August 20 (I-A Tr. 32). At this point, petitioner consulted counsel and on August 18, 1964, filed an Amended Petition (I-A Tr. 33).

During the same month, petitioner moved with his family to Carson City, Nevada (I-A Tr. 80), where he took a job as Budget Analyst for the Nevada Legislative Council Bureau (I-A Tr. 67, 69). In his capacity as Budget Analyst, petitioner entered upon a season of extra heavy workload in November (I-A Tr. 57, 67, 69). During most of this period, the Nevada Legislature was in session, and petitioner was required to meet with committees of the Assembly and Senate virtually every day and to work most weekends (I-A Tr. 57). His duties included analysis of all Assembly and Senate bills, of which there were over 900, for their impact upon the budget

of the State government (I-A Tr. 67, 69). This situation continued at least through the Thursday immediately preceding trial in the Tax Court (II-B Tr. 8).

Faced with this picture, the Court made four rulings, each of which involved fundamentally the same issue, and each of which is the subject of a specification of error herein:

(1) On March 1, 1965, petitioner filed a Motion for Continuance (I-A Tr. 57), stating in support thereof that his duties with the Nevada Legislature would not allow sufficient time to prepare for trial. This motion was further supported by declarations signed by petitioner (I-A Tr. 67) and by his superior (I-A Tr. 69) and filed on March 24. The respondent opposed this motion, but made no comment whatever with respect to petitioner's duties with the Legislature (I-A Tr. 61-66; II-B Tr. 3-5). The Tax Court denied petitioner's motion on April 5, and set the case for trial to begin on April 7, 1965 (II-B Tr. 8, 10).

(2) On April 8, petitioner concluded that further trial without adequate preparation was pointless, and renewed his motion for continuance (II-B Tr. 94). The Court again denied the motion (II-B Tr. 101).

(3) Respondent's motion to dismiss for lack of prosecution followed (II-B Tr. 112), which the Court granted (II-B Tr. 120)(I-A Tr. 71).

(4) Petitioner on May 10 filed a Motion to Set Aside Order of Dismissal (I-A Tr. 72) and a supporting

declaration (I-A Tr. 78). The Court denied this motion two days later (I-A Tr. 72).

SPECIFICATION OF ERRORS RELIED UPON

1. The trial court erred in denying petitioner's motion for a continuance on April 5, 1965.

2. The trial court erred in again denying petitioner's motion for continuance when it was renewed on April 8, 1965.

3. The trial court erred in granting respondent's motion to dismiss the case for failure to prosecute.

4. The trial court erred in denying petitioner's motion to set aside order of dismissal.

SUMMARY OF ARGUMENT

The "discretion" a court is required to exercise in ruling on a motion for continuance or dismissal "is not a capricious or arbitrary discretion, but an impartial discretion . . . to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." Bailey v. Taaffe, 29 Cal. 422, 424 (1866). The court below did not so exercise its discretion in this case. It did not fairly weigh the prejudice to petitioner that followed from the action it took against the complete lack of prejudice to respondent had it chosen the alternate course. Instead, it considered only

its own convenience. The Court made up its mind before learning the facts.

ARGUMENT

I. IN RULING ON PETITIONER'S MOTION FOR CONTINUANCE, AND ON RESPONDENT'S MOTION FOR DISMISSAL, THE TAX COURT FAILED TO EXERCISE ITS DISCRETION IN A LAWFUL MANNER.

The fundamental question the Tax Court had to answer was whether petitioner should have more time within which to gather his documentation and prepare his case[3]. In arriving at the answer to that question, the Court was required to exercise "discretion." That word has been aptly defined in an oft-quoted

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[3]Following are the applicable Tax Court Rules of Practice:

Rule 27(d)(1) - Court actions on cases set for hearing on motions or trial will not be delayed by a motion for continuance unless it is timely, sets forth good and sufficient cause, and complies with all applicable rules.

Rule 19(b) - Motions will be acted upon as justice may require . . . .

Rule 20(a) - An extension of time . . . may be granted by the Court within its discretion upon a timely motion filed in accordance with these Rules setting forth good and sufficient cause therefor . . . .

Rule 21 - A case may be dismissed for cause upon motion of either party or of the Court.

opinion of the California Supreme Court:

> "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." Bailey v. Taaffe, 29 Cal. 422, 424 (1866).

Did the Tax Court judiciously and lawfully exercise its discretion, or did it act arbitrarily and capriciously? A careful reading of the record demonstrates that it followed the latter course.

When petitioner's Motion for Continuance first came on for hearing on April 5, 1965, it was evident that petitioner was not and could not have been ready for trial. Petitioner had been involved in a period of extra heavy work on behalf of the Nevada Legislature ever since the previous November (I-A Tr. 57, 67, 69). Even if all necessary records and documentation had been gathered prior to November of 1964, it is not realistic to suppose that petitioner and his counsel could have engaged in the sort of preparation that is always necessary shortly before trial if the litigant's case is to be adequately presented. The Court brushed this difficulty aside: "We all have that difficulty of business" (II-B Tr. 8). Work being done for a state legislature in

session is not the sort of "difficulty of business" that "we all have." The worker in such circumstances cannot arrange his own affairs; he must adapt himself to the convenience of the legislature.

Respondent made no showing of any prejudice which he would have suffered had the continuance been granted. No witnesses had been called by respondent, nor did any other reason appear to make it important to him that the case be tried at the April 5 calendar rather than at a later time.

Indeed, the Court made it clear that it was considering not the equities between petitioner and respondent but its own convenience:

> ". . . We can't set it for call and come out from Washington - I come out and bring my Clerk - and still somebody isn't ready . . . ." (II-B Tr. 9).

Alamance Industries Inc. v. Filene's, 291 F.2d 142 (Ist Cir. 1961) provides some analogy to the present case. Appellant therein was not prepared to go to trial in Massachusetts because it had been seeking a determination of the same issue in North Carolina. The District Court in Massachusetts offered appellant the choice of a dismissal with prejudice or trial in 60 days. At the trial which followed, appellant stood mute and its complaint was dismissed. Said the Circuit Court at page 145, 6:

> "Apparently what principally lay behind the district court's determination to try the case is to be found in

> its remark, made at the first hearing, that the 'public interest' of not having a case lie on its docket for fourteen months must control 'regardless of private interest.' We cannot accept this statement either as the formulation of a generally applicable principle or as a proper criterion for the disposition of this particular case. Courts exist to serve the parties, and not to serve themselves, or to present a record with respect to dispatch of business. Complaints heard as to the law's delays arise because the delay has injured litigants, not the courts. For the court to consider expedition for its own sake 'regardless' of the litigants is to emphasize secondary considerations over primary."

In any event, and despite the implication in the Court's remarks that it would not have enough to do if petitioner's case were not tried, it is obvious that its own convenience would not have been upset had the continuance been granted. The Court had more than enough cases to keep it busy; even though his Honor stated that "I will try to be as generous as I can in setting a time" (II-B Tr. 9), the Court heard at least one case after petitioner's case (II-B Tr. 29).

Up to that time, the case had certainly not languished in the Tax Court. It was set for trial as expeditiously as it possibly could have been; an order for trial status report indicating that the case would be set for trial on April 5, 1965 was dated September 25, 1964 (I-A Tr. 101), eight days after the case was put at issue by the filing of

respondent's answer (I-A Tr. 54).[4] No continuances had previously been granted or requested; the case is therefore unlike such cases as Silagye v. Commissioner, 192 F.2d 886 (2nd Cir. 1951) and similar cases in which continuances had been granted previous to the denial of continuance complained of.

Nor does this case bear any similarity to such cases as Homer H. Germaine, 11 TCM 226, in which petitioners first announced that they were read for trial and only moved to continue after it became apparent that their proof would fail. Petitioner herein made it abundantly clear that he was proceeding to trial only because the Court left him no alternative, and that he had proof of his claims but that it was not ready. His motion for continuance was grounded upon the fact

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[4] Petitioner's response to the order for trial status report made it clear that petitioner did not expect that he could be ready for trial by April (I-A Tr. 102). The response was, through inadvertence, not mailed until December 16, 1965, seven days after the date specified in the order (I-A Tr. 101). In the ordinary course of events, the Tax Court would nevertheless have received it well in advance of December 22, when it prepared the calendar for the April 5, 1965 San Francisco session (I-A Tr. 99), and of December 30, which is the date of Notice Setting Case for Trial (I-A Tr. 56). The certificate of Howard P. Locke dated October 13, 1965 (I-A Tr. 99-100) was the first advice to petitioner that the Tax Court had no record of receipt of his response. According to that certificate, "response to trial status orders are not permanently retained or made a part of the record in a case;" it is not clear whether there would exist any record of the response if it had been received.

that he was not ready for trial. When he attempted to put on a case in these circumstances, he floundered, as he had, in effect, told the Court he would. Some of the Court's remarks, when placed against the situation which petitioner had frankly described to the Court, are illuminating:

> "He must have records or some data by which he can identify the places of employment and residence and work." (II-B Tr. 59).
>
> "Even though the man doesn't have the records, he ought to have some records . . . ." (II-B Tr. 89).
>
> "You have got to get together and have your proof ready or else acknowledge that you just haven't the proof." (II-B Tr. 92).

It was on the basis of these and similar remarks that petitioner concluded that it would be pointless to proceed further, and renewed his motion for a continuance (II-B Tr. 94). From this point on it was entirely clear, if it had not been before, that the Court's choice lay between granting petitioner's motion or dismissal. The Court denied petitioner's motion in unequivocal language:

> ". . . (T)he request for a continuance should be and is denied . . . " (II-B Tr. 101).

After this ruling, a curious exchange took place. The Court asked counsel for respondent what efforts had been made to obtain proof of facts from petitioner prior to trial (II-B Tr. 103). Petitioner's counsel asked whether the motion for a continuance was still under consideration (II-B Tr. 103-

104). The Court answered:

> "I have stated that I do not intend to do it and I do intend to affirm it, but I am trying to pull together the threads here that will provide additional support for the reasonableness of my action." (II-B Tr. 104).

In other words, the Court at least from that point on was interested not in ascertaining facts upon which to reach a reasoned decision, but only in making a record to support a decision it had already made.

The next procedural event was respondent's motion to dismiss the case for lack of prosecution (II-B Tr. 112).

"What constitutes 'failure to prosecute,' of course, depends on the facts of the particular case, and the Court should consider all the pertinent circumstances in exercising its discretion." 5 Moore, Federal Practice 1119 (2nd Edition, 1964). (The author was discussing the analogous rule of the Federal Rules of Civil Procedure, Rule 41(b).) Cases in which grants of dismissals were held to constitute abuses of discretion include Carnegie National Bank v. City of Wolf Point, 110 F.2d 569 (9th Cir. 1940) and Thomas v. Commissioner, 185 F.2d 851 (6th Cir. 1950).

In view of the Court's last quoted comment (and see similar comments at II-B Tr. 107 and 108), it is obvious that the Court did not "consider all the pertinent circumstances." In arguing respondent's motion to dismiss, counsel for both

sides were addressing themselves to a mind already closed.

Had the Court objectively considered the facts of record, it might have concluded that the vast blocks of unexplained time during which, according to resondent (II-B Tr. 109-111) no documentation of deductions had been presented to agents of the Internal Revenue Service simply did not exist. Petitioner was first approached by the Service in April of 1961 (II-B Tr. 109). At least a few potential issues were settled between then and December of 1963 (II-B Tr. 117), during which period petitioner was working nights and week-ends (I-B Tr. 79) in his efforts to rebuild the fortune he had once had and lost (II-B Tr. 38, 44). (We are not, of course, here concerned with the business acumen which petitioner may or may not have demonstrated in his efforts to rebuild his fortune. The pertinent point for purposes of this appeal is only that he was extremely busy, not whether his efforts were wisely directed.) From December of 1963 until shortly before he moved to Sacramento and began his duties as Budget Analyst for the Legislature, the time that he felt he could devote to this case was necessarily given over to the preparation of documents for filing in the Tax Court (I-A Tr. 1, 23, 28).

Whether the Court could have considered all of these facts, and, in the proper exercise of its judicial discretion, still denied petitioner's motions for continuance and granted respondent's motion for dismissal is a question this Court

need not decide. A careful reading of the transcript leaves no doubt that the Tax Court did not do so. Petitioner's contentions were not given the unbiased attention and the Tax Court's decision did not reflect the careful judgment to which petitioner was entitled.

CONCLUSION

Petitioner submits that the judgment of dismissal should be reversed and the case returned to the Tax Court with instructions that it be set for trial.

Dated, Oakland, California,

February 11, 1966

Respectfully submitted,

JOHNSTON & PLATT

By ROBERT D. PLATT
Attorneys for Petitioner

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT D. PLATT
Attorney for Appellant

CERTIFICATE OF MAILING

I, the undersigned, declare under penalty of perjury:

That I am a citizen of the United States, over the age of 18 and not a party t
e within cause or proceeding; that I am an employee of Alameda County
d my business address is 833 First Western Building, Oakland, California
at I served a true copy of the attached Petitioner's Opening Brief
y placing said copy in an envelope addressed to: JOHN B. JONES, JR. and
ICHARD M. ROBERTS, Acting Assistant Attorney General, Tax Division,
United States Department of Justice, Washington, D.C. 20530

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